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# In the Supreme Court of the United States

OCTOBER TERM 1964

No. 788

STATE OF MINNESOTA, EX REL. ROGER W. JENSON
*Petitioner*

vs.

CIVIL SERVICE COMMISSION OF THE CITY OF MINNEAPOLIS, A MUNICIPAL CORPORATION, AND THOMAS O. KACHELMACHER, GLEN F. GALLES, JOHN F. BURMEISTER AND JOHN W. PROCTOR
*Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF FACTS AND CORRECTION OF INACCURACIES AND OMISSIONS IN THE STATEMENT OF FACTS BY PETITIONER

As was brought to the attention of the Court below, the record as printed by petitioner was fragmentary, replete with omissions from the settled case, edited, distorted, and modified so as to present a biased statement.

Respondents were obliged to print a supplemental record, nine copies of which have been filed herein.

The statement of facts presented to this Court in the petition for writ of certiorari (pp. 3-6) like his recital in the court below, cannot be accepted. Correction is difficult to accomplish briefly, since he states facts which are not supported by the record references he makes, and he is not candid, misrepresentation being common, which becomes the more apparent in the light of matter omitted from his record which has been supplied in respondents' supplemental record. We will first attempt to make a fair statement of the facts supported by the full record and then make necessary specific refutation or modification of recitals in petitioner's statement.

**1. Respondents' statement of facts.**

For at least a year prior to December 8, 1961, when he was suspended and recommended for discharge his superiors in the Division had been concerned about petitioner's work performance (R. p. 47, f. 3).

A major source of concern revolved about the "case file" which the Division establishes for each relief recipient or applicant. The purpose of this file is to have a record of the facts pertinent to each relief recipient or applicant, and the case worker is to dictate into it pertinent matter relating to the granting or withholding of relief and the expenditure of public funds (Supp. R. p. 6, f. 2; p. 10, ff. 2 & 3; and p. 11, f. 3). After interview or investigation the case worker dictates the matter into a machine and a Division transcription operator will type it up and return it to the case worker along with the file for him to check the latest recorded entry for accuracy and then authenticate it

by appending his signature to the entries (Supp. R. p. 6, f. 2).

After becoming concerned about his work, including deficiencies in his dictation consisting of his injection into a relief recipient's file of extraneous comment, grievances of various kinds, and opinion irrelevant to the file and the purposes for which it was set up, the administrative officers of the Division proceeded to observe his day to day work by having the transcription operator make copies of his dictation for their inspection. This was an entirely proper exercise of supervisory direction of the work of the Relief Department so that it could review and evaluate the work of this relator, as it had done of others, it being a common procedure for supervisory personnel to review a case worker's work by reading his dictation (Supp. R. p. 11, ff. 1-3; p. 12, f. 1; p. 16, ff. 2 & 3; p. 17, ff. 2 & 3; and R. p. 47, f. 2; p. 48, f. 2) and it was consistent with good administration and supervision (Supp. R. p. 11, ff. 1 & 2).

On numerous occasions one or another of his superiors counseled with him and discussed the improprieties which they saw in his work. Witness Olson was "tremendously concerned about the whole area of his performance" (R. p. 53, f. 2); complaint procedure was explained to him (Supp. R. p. 21, f. 1); as was grievance procedure and channels (R. p. 50, f. 1). Unit Supervisor Gooley told him to put pertinent information into case records and if he continued not to do so, he would recommend disciplinary action (R. p. 62, f. 2). Various superiors tried to direct and counsel with him on various occasions including early February, 1961 (R. p. 51, ff. 1-3); March 15, 1961 (R. p. 53, ff. 2 & 3; and R. p. 54, f. 1); the first part of April, 1961 (R. p. 66, f. 3) May, 1961 (R. p. 54, f. 3; p. 55, f. 1); June

8, 1961 (R. p. 65, ff. 2 & 3; and p. 66, ff. 1 & 2); March 30, 1961 (R. p. 47, ff. 1 & 2); July 19, 1961 (R. p. 60, f. 2); October 30, 1961 (R. p. 62, f. 3); December 7, 1961 (R. p. 122, f. 3). The supplemental record discloses that he was also counseled on June 1, 1961 (Supp. R. p. 12, f. 1; and p. 18, ff. 2 & 3; p. 19, f. 1) (see also Supp. R. p. 17, ff. 2 & 3).

For all the counselling he did not change (Supp. R. p. 18, ff. 2 & 3).

When Department witness Olson was asked what he meant when he was critical of petitioner's dictation as being "editorializing" he said "I also probably used a number of other adjectives in describing the problem that I saw in his case recording, and these other adjectives would relate to what I would call lack of objectivity in his case recording" (Supp. R. p. 15, ff. 2 & 3). Examples of this type of work were read into the record as excerpted from seven case files (R. p. 14, f. 2-p. 17, f. 3; Supp. R. p. 12, ff. 2 & 3) and (R. p. 22-p. 23, f. 1).

By far the great bulk of objectionable dictation by relator was placed in the record by the department in the form of exhibits, and only the earliest examples in point of time were read into the record. The rest are found in Exhibit D consisting of 50 excerpts from case files, being further examples of objectionable dictation (R. p. 24, f. 2); Exhibit E, printed as Appendix II to the Supplemental Record herein (Supp. R. p. 29); and Exhibit F, consisting of six more objectionable case file entries (R. p. 25, f. 2).

Other activity considered to be improper on his part included his improper preparation of daily report sheets, Exhibits A and B (Supp. R. p. 6, f. 3; p. 7, f. 1); a letter which did not follow established channels and grievance

procedure (Supp. R. p. 7, f. 3-p. 9, f. 3); his use of IBM forms designed for statistical purposes as a vehicle for jokes (Supp. R. p. 15, ff. 1 & 2; R. p. 26, f. 3-p. 30, f. 2; Supp. R. p. 24, ff. 1 & 2).

In addition he impeded public business (Supp. R. p. 20, f. 1) in matters related to pay, sick and military leave (Supp. R. p. 19, ff. 1 & 2) retirement and paychecks (Supp. R. p. 17, f. 3, and p. 18, f. 1) and deliberately dressed poorly as a protest (R. p. 62, f. 3; p. 63, f. 1).

He testified that his purpose was to reach the Administration with his grievances through the medium of the case file (R. p. 127, f. 1) and was so reaching them through their receiving copies of his work, but he inconsistently protested to the transcription operator that she was violating a law by making such copies (R. p. 10, ff. 1 & 2).

Then, early in November, 1961, he informed the operator that in all cases where a copy was being made the entry should show "CC:D.P.R. Administration" in every case (R. p. 9, f. 2). It was improper for him to insist on this (Supp. R. p. 11, f. 3; R. p. 9, f. 2; p. 49, f. 3; p. 50, f. 1), and for him to refuse to sign if the clause wasn't transcribed (Supp. R. p. 10, f. 2). Signing is a "must" (Supp. R. p. 10, ff. 2 & 3).

On the morning of December 7, 1961, Director Olson told petitioner it was absolutely necessary that he sign his dictation; petitioner admitted he would have time enough to do so on that day but said: "I am not sure I am going to sign it" (R. p. 11, f. 2). Superintendent Jensen ordered relator to sign his dictation either at the close of the day on December 7th or in the morning of December 8, 1961 (R. p. 122, f. 3; p. 11, f. 2) and told him not to carry on any other activity but to do exclusively the signing of dictation

(R. p. 12. f. 1). He was ordered to sign by Unit Supervisor Gooley (Supp. R. p. 26, f. 3).

On direct examination by his counsel, referring to the morning conference on December 7, 1961, petitioner stated: "I remember Mr. Olson making a statement 'Are you going to take care of signing dictation?' and I said, 'Is the superintendent still going to give (sic—get?) blind carbons?' and Mr. Olson said: 'Yes', and I said 'Let's bring that to a head.' " (R. p. 123, f. 2).

The violation of direct orders to sign his dictation (Supp. R. p. 21, f. 2) immediately preceded his suspension and recommendation for discharge.

It is quite clear that petitioner well understood that it was the desire of his superiors and their direction that he take care of the signing of his dictation on December 7th and 8th, 1961 (R. p. 123, ff. 1-3). Relator stated as to his daily sheet for December 8, 1961 (Exhibit 6; R. p. 122, f. 1) that his dictation on that day probably accounted for the 45 cases that were left on his desk unsigned at the close of business on December 8, 1961. However, the list of these cases shows 29 of the 45 files left on his desk for signature had been transcribed and left there from November 20 to 28, 1961 (Supp. R. p. 11, f. 1).

A few miscellaneous statement of facts and references should be made:

"Day sheets", "Daily report sheets" are explained (Supp. R. p. 6, f. 3; p. 7, f. 1). Petitioner's letter of November 18, 1961 was written improperly, failing to follow established grievance procedures (R. p. 9, f. 1; Supp. R. p. 7, ff. 2 & 3; letter itself is Supp. R. p. 7, f. 3-p. 10, f. 2). The importance of determination of "settlement" is explained as bearing on the question of which political subdivision must pay for relief given but relator stated in a case file: "Settlement; who knows and who cares?" (Supp. R. p. 12, f. 3).

**2. Specific corrections in petitioner's statement.**

a. The record is not overwhelmingly clear that petitioner was an outstanding social worker (Petition p. 4). The record references given to certain fellow workers' opinions as to his competence should be evaluated as to foundation, weight and sufficiency, and also as to what they actually did testify to, since each had but a very limited opportunity to observe and judge his performance, as appears largely by testimony omitted from relator's record (Supp. R. p. 22, ff. 1-3; p. 22, ff. 2 & 3; p. 23, ff. 1 & 2; p. 24, f. 3; p. 25, ff. 1-3; and p. 25, f. 3; p. 26, f. 1). The succeeding statement is not supported by the cited record references and there is no justification for the inferences and statements in relator's statement of facts that administration witnesses generally agreed or admitted that he was either competent, the best case worker, an excellent case worker, or a perfect one (R. p. 39, f. 3; p. 73, f. 3; p. 75, f. 2; Supp. R. p. 21, f. 3; p. 22, f. 1; R. p. 46, f. 2).

b. He was not fired for exercising any recognizable right to free speech and this was not openly admitted as a cause by the "key witness" (Petition p. 4). The statement by petitioner is not supported by his record references.

c. The statement regarding truth in petitioner's reporting is unsupported by petitioner's references (Petition p. 4) (see also R. p. 43, f. 3).

d. The statement "Not one word was deleted from your petitioner's case reporting although any one of at least five or six levels above him had the authority to change it" (Petition p. 4), is completely unsupported by the record references and, in fact, as to the authority to change or alter the report or case entry, the record is completely to the contrary (R. p. 58, ff. 2 & 3).

e. A question of free speech was asserted by petitioner in his defense at various stages in the proceedings by him alone, but the statement "The matter provided the primary basis of the initial discharge" (Petition p. 5), is not supported by petitioner's record references or any other parts of the record.

f. The statement "The respondents dealt with the issue of free speech at pages 45 through 50" (Petition p. 5), is true only to the extent that respondent devoted those pages to a refutation of petitioner's claim that a constitutional issue of free speech was somehow involved and distinguishing each of the cases upon which he relied below: *Wieman v. Updegraff* (1952), 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 215; *Stockhower v. Board of Higher Education* (1956), 350 U.S. 55, 76 S. Ct. 637, 100 L. Ed. 692; and *Roth v. U.S.*, 354 U.S. 496, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (none of which he now cites in this petition).

g. From its opinion it is clear that the Minnesota Supreme Court did not take the free speech claim seriously in its findings of the adequacy of the grounds for discharge for misconduct and it also indicated its reaction to petitioner's claim that freedom of speech was involved, which he had asserted at item 22 in his assignment of error in his brief to that Court, when it said:

> "Contrary to relator's contention, this appeal presents no novel or unusual questions. In essence, all of his 25 assignments of error simply repeat the errors asserted against the respondent before the district court. Upon the record before us, the appeal to this court amounts to no more than an exercise of relator's statutory right to have the administrative proceedings twice reviewed."

## ARGUMENT

### 1. Petitioner's Constitutional Guarantees of Freedom of Speech Were Not Impaired or Involved, and There is No Substantial Federal Question Upon Which a Jurisdiction Can Here Be Invoked.

Petitioner makes the claim that his constitutional rights have been violated insofar as his superiors in the Division of Public Relief have attempted to interfere with his freedom of speech. It does not appear from the record that there has been any attempt to interfere with his rights to freely express himself, either on or off the job, with the single exception that he was counseled and instructed not to dictate into case files and other official records his general views, criticisms of his superiors and the officers of the city, county and state government, his adverse opinions of the character of relief clients, grievances against the system in general, or anything else irrelevant to the subject matter of an individual relief recipient's file and need or lack of need for public assistance (R. p. 65, ff. 2 & 3; p. 57, ff. 2 & 3). The Division of Public Welfare neither has, nor had any obligation to provide relator, or anyone else, with a forum in which he may freely express his opinions. The public and the city have a right to demand that while he is engaged in performing public business for which he is paid a salary, that he shall do so within the framework of the rules and policies of the department and the city, subject to the lawful orders, instructions and directions of his superiors.

No case can be found by respondent wherein the court considered a question of constitutional guarantees of free speech in connection with the asserted right of a private or

public employee that he may write into official files and internal records of the business anything he wishes, heedless of direction by administrative superiors. Petitioner has not cited any such case supporting his position that freedom of speech under the 1st or 14th Amendments to the U.S. Constitution is at a) involved in such a situation.

In pretended s' port of his claim that somewhere involved here is an issue of freedom of speech petitioner now cites four cases on page 7 of his petition. However, he does not in any way relate or explain what, if any, pertinency these cases have in relationship to his case, other than his representation that your Court is cognizant of the importance of the Bill of Rights and the importance of freedom of speech guaranteed thereby. These cases when read are found to militate against rather than support his contention that there is involved here a constitutional issue of free speech.

Petitioner also cites on page 7 of his petition *163 A.L.R.* 1531 to 1560. In this annotation it is clearly demonstrated that the courts have not considered that free speech considerations apply to matters within the actual performance of the duties of their office which are, as we have seen, the only type of matters which were under consideration in the present case. In that annotation entitled "Governmental control of activity or speech of public officers or employees in respect of matters outside the actual performance of their duties", the following general statement is made:

> "The courts have had occasion in numerous instances, to pass upon the validity of legislative provisions and administrative rules or regulations upon the actions or speech of public officers or employees in respect of matters outside the actual performance of their duties. Such provisions and regulations have

frequently been challenged upon the ground that they constitute an unwarranted encroachment upon the domain of individual liberty within the protection of constitutional guarantees. The cases dealing with the question are generally to the effect that the governing authority may impose such restriction in so far as they are designed to secure the proper administration of the office or department, or to protect or promote the public interest in other respects and have a reasonable relation to such purpose, although particular provisions, regulations or orders have in some instances been held invalid for various reasons and in respect of some matters there is some conflict of opinion.

"Decisions upholding such restrictions have frequently been predicated upon the theory that the governmental authority, in creating a public office or providing for public employment, may attach such conditions as it chooses, and that one who accepts such office or employment is bound by the conditions attached thereto so long as he continues therein and to that extent surrenders or waives such rights and privileges as he might otherwise be entitled to exercise. The doctrine, in other words, is that one may and must choose between the privilege of holding the office or engaging in the employment in question and the privilege of exercising the constitutional rights involved in the attached conditions or restrictions."

As in *State ex rel. Curtis v. Steinkellner* (1945), 247 Wisc. 1, 18 N. W. 2d 355, there was here an established grievance or complaint procedure which employee knew about and did not follow. The Court said:

"Considered as a whole, the rules simply require that complaints must come through the regular channels— It seems to us entirely reasonable that so long as there

> are outlets for complaints the discipline of the department be maintained by avoiding public controversies between the subordinates of the department and their chief. Any other rule would tend to destroy the discipline of the department and it seems to us that regardless of the rule prohibiting giving information outside the department the indulgence in public criticism such as is involved here in advance of any attempt to have the grievances settled within the department is an act of insubordination and is subversive of discipline. The foregoing conclusions are enough to decide this case and we see no reason to speculate on extreme situations which might with more force be argued to interfere with the constitutional right of free speech."

The administrative officials of this public agency instructed and directed petitioner, a subordinate employee, as to what, and the character of, information it wanted him to record in confidential, internal files and records, which in the normal course would not be seen outside of the agency (in spite of the contrary inference of petitioner) (R. p. 49, f. 1). No court decision ruling on this rather obvious elementary right of the agency has been found. It must be observed, however, that there are cases which go far beyond such a situation in placing limitations upon public employees' rights of free speech.

In the case of *United Public Workers of America (C.I.O), et al. v. Mitchell, et al.*, 330 U.S. 75, 102, 67 S. Ct. 556, 571, 91 L. Ed. 754, 774, in construing the "Hatch Act", the Court said:

> "* * * Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of

> the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the general existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions."

and at page 95 (S. Ct. 567, L. Ed. 770):

> "The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery."

At page 103 (S. Ct. 571, L. Ed. 774), the Court said:

> "When actions of civil servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required."

*Adler v. Board of Education of the City of N.Y.* (1951), 342 U.S. 485, 492, 72 S. Ct. 380, 384, 96 L. Ed. 517, 524, involved the Civil Service Law of New York, making ineligible for employment in any public school any member of any organization advocating the overthrow of the government by force, violence or any unlawful means. It was held constitutional. The Court said:

> "It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. Communications Assn. v. Douds, 339 U.S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. United Public Workers v. Mitchell, 330 U.S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. Has

> the State thus deprived them of any right to free speech or assembly? We think not * * *."

The question was well summed up early when in 1891 Mr. Justice, then Judge Holmes, said in *McAuliff v. New Bedford*, 155 Mass. 216, 220, 29 N. E. 517:

> "There is nothing in the constitution or the statute to prevent the city from attaching obedience to this rule (against soliciting money or aid for a political purpose) as a condition to the office of policeman, and making it part of the good conduct required. The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here."

**2. Even If a Federal Question Were Involved and Had Been Properly Raised the State Court Judgment Was Based Upon an Adequate and Independent Non-Federal Ground.**

Your Court will not review a state court judgment based upon an adequate and independent non-federal ground, even though a federal question be involved and perhaps wrongly decided. *Murdock v. Memphis*, 20 Wall. 590, 636; *Berea College v. Kentucky*, 211 U.S. 45, 53; *Fox Film Corp. v. Muller*, 296 U.S. 207. As was stated in *Herb v. Pitcairn*, 324 U.S. 117, 125-6:

> "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgment, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."

The Supreme Court of Minnesota obviously was not persuaded that there was any basis for seriously considering the freedom of speech protestations of petitioner as is clear from its opinion and its denial of the petition for rehearing.

The Court upheld the dismissal of this employee for "misconduct" pursuant to the provisions of *Minnesota Statutes* 197.46 (the "veterans preference act"). The Court said:

> "Consistent with the written charges, specific findings of fact were made to the effect that contrary to the instructions of his supervisors relator on specific dates and on other occasions persisted in injecting irrelevant personal comments and criticisms into official case records assigned to him for investigation and report. The commission also found that he willfully disobeyed two direct orders of his superiors to sign his dictation and that he persistently refused to comply with departmental customs, requirements, and procedures."

The Court also said:

> "From a careful review of the printed record submitted by relator, the supplement thereto supplied by respondent, and the exhibits, we agree with the district court that the proceedings were initiated upon a proper notice sufficiently detailed and adequate in substance and that relator was accorded a fair and full hearing conducted in substantial compliance with the law governing respondent's authority."

(In passing, it should be noted that the bulk of the evidence bearing upon petitioner's misconduct as found by the commission, the District Court, and the Supreme Court of Minnesota is to be found in the numerous exhibits introduced which it is believed are not before your Court at this time.)

The Court also said:

> "The record, as demonstrated by the exhibits, is replete with instances of his pertinacious refusal to follow the instructions of his superiors, to obey orders, and to conform to departmental requirements and procedures deemed important and vital to the conduct of public business, all of which the commission was at liberty to regard as misconduct justifying dismissal."

Thus, on the face of the decision of the Minnesota Supreme Court it is apparent that it found ample bases for its decision on adequate and independent nonfederal grounds, obviating review by your Court.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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